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**IN THE
COURT OF APPEALS OF INDIANA**

ANNE ELIZABETH KEENEY,

Appellant-Defendant,

vs.

ROBERT O. CARUTHERS, JR.,

Appellee-Plaintiff.

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No. 10A05-0512-CV-699

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel Donahue, Judge
Cause No. 10C01-0408-CT-516

January 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Anne Elizabeth Keeney appeals the denial of her motion for summary judgment against Robert Caruthers, Jr. She argues the suit against her as a probation officer should be dismissed because Caruthers failed to comply with the notice provisions of the Indiana Tort Claims Act, and the suit against her as an individual should be dismissed because she was acting within the scope of her employment. Keeney's communications with Kentucky probation officers were within the scope of her employment, barring a suit against her in her individual capacity. Caruthers' failure to provide notice to Keeney's employer bars the claim against Keeney in her official capacity.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

Keeney is a probation officer in Clark County, Indiana. Caruthers was a probationer under Keeney's supervision in August and September of 2003. In September 2003, Caruthers requested his probation be transferred to the Louisville, Kentucky, department of probation and parole. The transfer of probation was complete on November 18, 2003. That same day, Keeney called Sabrina Farris, Caruthers' new probation officer, and told Farris that "she had gotten through a good resource that he was still dealing in controlled substances across the State line." (App. at 61.)¹ Based on this information, Kentucky probation and police officers searched Caruthers' residence and found a loaded .22-caliber pistol. Caruthers was charged under Kentucky law with

¹ The source was another of Keeney's probationers.

possession of a handgun by a convicted felon. His Indiana probation was revoked and, on May 6, 2004, he was ordered to serve his previously suspended sentence.

On August 10, 2004, Caruthers, *pro se*, filed a verified complaint against Keeney “individually and in her official capacity.” (*Id.* at 5.) He alleged Keeney’s statement to Farris was defamatory and requested damages. Keeney filed a motion for summary judgment in October 2004, which motion was denied in a minute entry on June 20, 2005. We granted Keeney’s motion to accept her interlocutory appeal.

DISCUSSION AND DECISION

When reviewing a grant or denial of summary judgment, we apply the same standard as does the trial court. *Rogier v. Am. Testing & Eng’g Corp.*, 734 N.E.2d 606, 613 (Ind. Ct. App. 2000), *trans. denied* 753 N.E.2d 8 (Ind. 2001). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). If the movant designates evidence to support a *prima facie* showing that there are no genuine issues of material fact and that she is entitled to judgment as a matter of law, the “adverse party may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial.” T.R. 56(E). We do not weigh the evidence; rather, we consider the facts in the light most favorable to the nonmovant. *Rogier*, 734 N.E.2d at 613.

1. Official Capacity

Caruthers sued Keeney “individually and in her official capacity” as a probation officer. (App. at 5.) The Indiana Tort Claims Act provides that a “governmental entity

or an employee acting within the scope of the employee's employment is not liable" for losses occurring in certain circumstances. Ind. Code § 34-13-3-3. Notice must be given to the appropriate entity within 180 days of the loss for claims against political subdivisions, Ind. Code § 34-13-3-8, or within 270 days of the loss for claims against the State or a state agency. Ind. Code § 34-13-3-6. Therefore, to sue Keeney in her official capacity, Caruthers must demonstrate her actions were within the scope of her employment and he provided notice as required by the Indiana Tort Claims Act.

Claims against a governmental entity are barred unless notice is filed in a timely manner. Ind. Code §§ 34-13-3-8. Because a tort action against a governmental employee for actions taken within the scope of her employment may impose liability on the government employer, a plaintiff must provide notice to the employing agency before an action can proceed against the agency's employee. *Wright v. Elston*, 701 N.E.2d 1227, 1233 (Ind. Ct. App. 1998), *trans. denied* 714 N.E.2d 169 (Ind. 1999). The notice consists of a short and plain statement of the facts that includes "the circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all person involved if known, [and] the amount of damages sought." Ind. Code § 34-13-3-10.

Caruthers admits he did not file or attempt to file a notice of tort claim with Keeney's government employer.² Assuming *arguendo* Caruthers' loss occurred in May 2004 when he was ordered to serve his suspended sentence and not when he was initially

² Caruthers argued his incarceration tolled the notice provisions, and because he is suffering a "continuing" loss, he is not required to serve notice until 180 days after he is released.

arrested,³ his August 2004 complaint was filed within 180 days of the loss. Even if the complaint against Keeney contained the information required by Ind. Code § 34-13-3-10 and provided her with notice, Caruthers nonetheless failed to provide notice to the appropriate entity—Keeney’s government employer. *See Madden v. Erie Ins. Group*, 634 N.E.2d 791, 794 n.2 (Ind. Ct. App. 1994) (Tort Claims Act “does not say notice to an individual employee of the State will satisfy its notice requirement.”). Absent the required notice, Caruthers’ suit against Keeney in her official capacity is barred, entitling her to summary judgment.

2. Individual Capacity

If a plaintiff seeks to file a lawsuit against a government employee personally, he “must allege that an act or omission of the employee that causes a loss is: (1) criminal; (2) clearly outside the scope of the employee’s employment; (3) malicious; (4) willful and wanton; or (5) calculated to benefit the employee personally.” Ind. Code § 34-13-3-5. “The complaint must contain a reasonable factual basis supporting the allegations.” *Id.* To sue Keeney as an individual, Caruthers must demonstrate she was acting outside the scope of her employment. Whether the tortious act of an employee is within the scope of employment is, generally, a question of fact. *Bushong v. Williamson*, 790

³ *Cf. Orem v. Ivy Tech State College*, 711 N.E.2d 864, 869 (Ind. Ct. App. 1999) (claim for constructive fraud accrued when employee was discharged, not when employee notified of anticipated elimination of position), *reh’g denied, trans. denied* 735 N.E.2d 222 (Ind. 2000); *Livingston v. Consolidated City of Indianapolis*, 398 N.E.2d 1302, 1304 (Ind. Ct. App. 1979) (claim for malicious prosecution accrued when judgment entered for plaintiff, not when plaintiff was arrested and charged).

N.E.2d 467, 473 (Ind. 2003). Under certain circumstances, the question may be determined as a matter of law. *Id.*

Keeney designated evidence, including affidavits, in support of her motion for summary judgment. In her affidavit, Keeney states she is a probation officer, Caruthers had been under her supervision, and his probation was transferred to Louisville. She received information regarding Caruthers' alleged interstate drug sales, reported the information to his probation officer in Louisville, and was "acting within the scope of [her] employment," (App. at 38), by doing so. Because acting within the scope of employment is a complete defense for government employees, this evidence was sufficient to establish a *prima facie* case for judgment in Keeney's favor.

Under T.R. 56(E), an "adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." In responding to Keeney's motion for summary judgment, Caruthers relied on his original complaint, testimony from two Kentucky probation officers, and an affidavit later struck by the trial court. He argued Keeney was acting as "a civilian," (App. at 49), because his probation had been transferred to Kentucky under an interstate compact and the "State of Indiana had no further responsibility . . . to monitor or otherwise supervise him." (*Id.*) We disagree.

Ind. Code § 11-13-4-1 describes this interstate compact and provides for the out-of-state transfer of parole and probation, from "sending" states to "receiving" states. Under the terms of the compact, the receiving state "will assume the duties of visitation

of and supervision over probationers or parolees of any sending state.” Ind. Code § 11-13-4-1(2). Transfer of supervision under this statute is not a transfer of jurisdiction. *Morgan v. State*, 691 N.E.2d 466, 468 (Ind. Ct. App. 1998). Officers from the sending state retain the right to “enter a receiving state and there apprehend and retake any person on probation or parole.” Ind. Code § 11-13-4-1(3). “Unless otherwise required by law, no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken.” *Id.* The decision of the sending state to retake a probationer or parolee is not reviewable by the receiving state. *Id.*

Although the day-to-day monitoring of probationers becomes the duty of the receiving state, the sending state does not abdicate its responsibility. Communications between probation officers in sending and receiving states regarding possible probation violations are appropriate. We conclude, as a matter of law, Keeney’s communications with Kentucky probation officers regarding a possible probation violation by Caruthers were within her scope of employment as an Indiana probation officer.

CONCLUSION

Under the facts of this case and as a matter of law, Keeney’s communications with Kentucky probation officers were within the scope of her employment as an Indiana probation officer. As a result, Caruthers’ may not bring suit against Keeney in her individual capacity. Caruthers’ failure to provide the notice required by the Indiana Tort

Claims Act bars his suit against Keeney in her official capacity. Accordingly, we reverse and direct the trial court to grant summary judgment in favor of Keeney in both her individual and official capacities.

Reversed and remanded.

BAKER, J. and SULLIVAN, J. concur.